

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HORIZON UNLIMITED, INC. : CIVIL ACTION
 :
 v. :
 :
 RICHARD SILVA & SNA, INC. : NO. 97-7430

MEMORANDUM and ORDER

Norma L. Shapiro, S.J.

August 31, 1999

Plaintiff Horizon Unlimited, Inc. ("Horizon"), alleging, inter alia,¹ violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. Ann. § 201-1 et seq., filed an action against defendants Richard Silva ("Silva") and SNA, Inc. ("SNA").² Plaintiff has moved for voluntary dismissal of this action pursuant to Rule 41(a)(2) and defendants have moved for sanctions against plaintiff's counsel under 28 U.S.C. § 1927 and against both plaintiff and its counsel under Federal Rule of Civil Procedure 11. For the reasons stated below, plaintiff's motion will be granted but this action will be dismissed with prejudice; defendants' motions will be granted in part and denied in part.

¹ Plaintiffs' other claims for negligence/ negligent misrepresentation, fraud and deceit, and breach of warranty were dismissed by Memorandum and Order dated February 26, 1998; plaintiffs' motion for reconsideration was denied by Memorandum and Order dated March 27, 1999.

² John Hare was originally a plaintiff as well, but his motion for voluntary dismissal was granted by Order of March 11, 1999.

BACKGROUND

Plaintiff corporation, by its president Paul Array ("Array"), purchased a Seawind airplane kit manufactured by SNA, of which Silva is president. Plaintiff alleges its Seawind airplane did not "perform according to specifications and building times" printed in the promotional materials. Its only remaining claim for violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. Ann. § 201-1, et seq., is based on alleged misrepresentations in SNA's promotional brochures. The claim states a cause of action only if the airplane was purchased for consumer rather than commercial use. The court commenced a hearing on that disputed issue of fact.

After many discovery disputes, several hearings, innumerable conference calls, and vigorous disputes of irrelevant issues, (e.g., defense counsel's status before the Supreme Court of the United States and Array's criminal history), plaintiff suddenly and unexpectedly moved for voluntary dismissal before the hearing could be concluded. Defendants oppose the dismissal and seek sanctions for having to defend an action allegedly instituted frivolously, vexatiously, and in bad faith.

DISCUSSION

I. Motion for Voluntary Dismissal

Federal Rule of Civil Procedure permits voluntary dismissal when an answer or motion for summary judgment has been served by an adverse party only by stipulation or court order. See Fed. R. Civ. P. 41(a). The dismissal may be with or without prejudice and "upon such terms and conditions as the court deems proper." Id.

Granting a motion for voluntary dismissal is within the sound discretion of the trial court.³ See Ferguson v. Eakle, 492 F.2d 26, 28 (3d Cir. 1974). Rule 41 seeks to prevent a dismissal prejudicing the other parties and to allow the court to design conditions to cure any prejudice. See John Evans Sons, 95 F.R.D. at 190; see also Ferguson, 492 F.2d at 28 (purpose of Rule 41 is to put control of dismissals at late stage of litigation in the trial judge). Dismissal is permitted if defendant will not suffer prejudice aside from the prospect of a second lawsuit. See id. The court should consider granting a motion for dismissal with prejudice if denying it would result in a useless trial. See id. at 190-91 (quoting 5 Moore's Federal Practice § 41.05(1), at 41-74). Granting the motion with prejudice gives

³ Plaintiff's motion does not specify whether it requests dismissal with or without prejudice; at oral argument, plaintiff clarified that it would not oppose dismissal with prejudice.

defendants a final and binding determination in their favor.⁴

See id. at 191.

The following factors determine whether to dismiss the action with prejudice: 1) whether motions for summary judgment have been filed; 2) the extent of defendant's efforts and expenses in preparing for trial; 3) excessive expenses in defending a second action; and 4) an insufficient explanation for dismissal by plaintiff. See Ellis v. Merrill Lynch & Co., 1989 WL 149757, *4 (E.D. Pa. Dec. 6, 1989).

Here, a summary judgment motion had been filed, and the action was almost terminated;⁵ after one and one-half years of litigation, the action might have been dismissed for lack of standing. While some of defendants' expenses are a result of

⁴ If voluntary dismissal is granted without prejudice, presumably defendants seek expenses as a condition of dismissal. See Davenport v. Gerber Products Co., 1989 WL 147550, *1 (E.D. Pa. Dec. 6, 1989)(costs and fees awarded when action dismissed without prejudice to compensate defendant for incurring the expense of litigation without benefit of final disposition). The court's disposition of defendants' motion for sanctions pursuant to Rule 11 makes granting the dismissal with prejudice more favorable to defendants.

⁵ The evidentiary hearing held on May 26, 1999, had not concluded; all that remained was the conclusion of cross-examination and redirect examination of Array, possibly one other witness for defendants, and closing arguments, all of which would not have taken longer than a half a day. The matter was not concluded because of the unavailability of plaintiff's president, Array. However, the hearing had already revealed Array's complete lack of credibility. It is now unnecessary to rule on the standing issue, but even if the court held that plaintiff did have standing to sue, only resolution of the matter on summary judgment or at trial remained.

their own over-zealous actions, the docket reflects an overwhelming amount of time and effort expended to date.⁶ Plaintiff might not bring a second action, but if one were filed it is not unreasonable to predict it would follow the same litigious path as the present action. Finally, plaintiff has given no reason for requesting dismissal, though its reason may be related to the evidentiary hearing commenced by this court on May 26, 1999, and discussed in this opinion in connection with the motions for sanctions. These factors weigh in favor of dismissing with prejudice.

John Evans Sons, Inc. v. Mark-Ironers, Inc., 95 F.R.D. 186 (E.D. Pa. 1982) is analogous. The plaintiff had moved for voluntary dismissal a week before the final pretrial conference and shortly before trial. The action had been in suspense for almost a year pending the outcome of litigation in California; it appeared the action would settle, but it did not. Plaintiff, moving for voluntary dismissal, claimed it was not worthwhile to pursue the claim financially.

The John Evans Sons court ruled that where a plaintiff seeks to dismiss an action with prejudice, the motion should be granted to avoid a needless trial. See id. at 190-91. Defendants were

⁶ The docket reflects one-hundred and twenty-three (123) filings, including 4 opinions by this court, two of which are listed supra at footnote 1; the court also denied class certification on May 11, 1998, and dismissed defendants' counterclaim on August 12, 1998.

not prejudiced since they received a decision with binding effect. See id. at 191. The court granted the motion for voluntary dismissal with prejudice but denied defendants' request for costs and attorney's fees. See id. Defendant was not entitled to attorney's fees because defendant could not have recovered fees had it been successful at trial. See id.

Granting a voluntary dismissal with prejudice in effect grants judgment in favor of defendant at the request of the plaintiff; defendants are in the same position they would have been in had the trial occurred, except they save the additional costs of litigation.

Fees and costs are authorized by Rule 41 to compensate the defendant for the cost of trial preparation when defendant will not receive a final determination on the merits. See id. The same consideration is not present where dismissal is with prejudice. See id. "Indeed, it has been held that if the dismissal is with prejudice the court lacks the power to require an attorney's fee to be paid, barring exceptional circumstances." Id. No exceptional circumstances exist to justify granting fees and costs. See id.

Defendants cannot recover attorney's fees in this action if they are successful at trial, so they are not entitled to attorney's fees when the action is dismissed with prejudice. Defendants are entitled to costs or expenses only if plaintiff or

plaintiff's counsel have engaged in sanctionable activities.

II. Motions for Sanctions

Courts are empowered to sanction attorneys by statute,⁷ rules,⁸ and inherent power. See Chambers v. NASCO, Inc., 501 U.S. 32, 41-42 (1991); Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980); Heffernan v. Hunter, __ F.3d __, 1999 WL 649628, *16 (3d Cir. 1999). The court must choose the sanction appropriate for the violation in the circumstances. See Zuk v. Eastern Pennsylvania Psychiatric Institute of the Medical College of Pennsylvania, 103 F.3d 294 (3d Cir. 1996).

A. Sanctions pursuant to § 1927

Section 1927 provides:

Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and fees reasonably incurred because of such conduct.

Sanctions under 28 U.S.C. § 1927 require a finding of willful bad faith. Ford v. Temple Hospital, 790 F.2d 342, 347

⁷ See 28 U.S.C. § 1927.

⁸Federal Rule of Civil Procedure 11 permits sanctioning attorneys for filing a pleading with insufficient basis in law or fact. Federal Rule of Civil Procedure 16 permits imposition of sanctions for failure to participate in good faith in pretrial conferences. Federal Rule of Civil Procedure 30 permits award of expenses incurred when a party fails to attend or serve a subpoena for a deposition. Federal Rule of Civil Procedure 37 permits sanctions if a party fails to cooperate with discovery. Federal Rule of Civil Procedure 56 mandates sanctions where an affidavit accompanying a summary judgment motion is made in bad faith.

(1986). Bad faith is found where there is "indication of an intentional advancement of a baseless contention that is made for an ulterior purpose, e.g., harassment or delay." Id. This indication may be express or implied from statements made on the record that a court may interpret as proving bad faith. See Zuk, 103 F.3d at 297-98.

Defendants rely on the misconduct of plaintiff's president, Paul Array, for many of their allegations. They attribute to counsel, Martin Pedata and Tracy Oandasen, awareness of Array documents establishing Array's lack of good faith in initiating and pursuing this action. These documents above do not establish counsel had no good faith reason for representing plaintiff in this action.⁹ Counsel might have known that Array sought to exercise his corporation's rights because a prior friendly business relationship had deteriorated, but a party may seek to prosecute legitimate rights even if its relationship with the opposing party has become hostile.¹⁰ That plaintiff's claims were later found to be of questionable legitimacy does not prove counsel acted in bad faith. Counsel's actions should not be viewed with hindsight but considered as of the time they

⁹ Another example of Horizon's misconduct and Array's malevolent intent is seen in a letter produced at the hearing in which Array proclaims he intended to "fry the bastard" and put defendants out of business.

¹⁰ Hare's earlier voluntary dismissal is irrelevant to whether sanctions should be imposed against counsel for also representing Horizon in the absence of any evidence on the record of the reasons for Hare's dismissal.

occurred.

Pedata was present during Array's deposition, during which Array's testimony cast doubt on his standing to sue.¹¹ This deposition was one of a number of depositions for several actions; plaintiff did not order copies of these depositions nor review their accuracy. Pedata may not have realized what Array said was inconsistent with the standing requirements of the UTPCPL.

Counsel was also present at the May 26, 1999, hearing during which Array contradicted himself several times and also contradicted his prior affidavit and deposition testimony. After this hearing strongly suggesting the complete lack of credibility of Array, plaintiff filed a motion for voluntary dismissal. Since the motion to dismiss came within a month of that hearing and before the instant motion, counsel's presence at the hearing does not prove their bad faith.

There is no clear and convincing evidence Pedata and Oandasen personally sought to harass defendants or had some ulterior motive other than litigating what they considered a meritorious claim. Counsels' conduct in the prosecution of this action cannot be found in bad faith on this record.

¹¹ Defendants never raised the sanctions issue at the time of the deposition.

B. Sanctions Pursuant to Rule 11

Federal Rule of Civil Procedure 11(c) provides a "court may ... impose an appropriate sanction upon the attorneys, law firms, or parties that have violated [the provisions of the rule] or are responsible for the violation." The standard to determine whether a violation has occurred is "reasonableness under the circumstances." Gaiardo v. Ethyl Corp., 835 F.2d 479, 482 (3d Cir. 1987). Unlike sanctions under 28 U.S.C. § 1927, bad faith is not required; voluntary dismissal of an action does not relieve a person from liability. See Lony v. E.I. Du Pont de Nemours & Co., 935 F.2d 604, 617 (3d Cir. 1991).

The Advisory Committee Notes to Rule 11 state, "The court has significant discretion in determining what sanctions, if any, should be imposed." In deciding whether to award attorney's fees, the court considers several factors, including: wilfulness of the improper conduct and/or any intent to injure; any practice or pattern; effect of the conduct on the action as a whole or a portion of it; effect on the time and expense of the litigation; and the actor's training in the law. See id.; see also Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90, 99 (3d Cir. 1988) (prompt action is required once a Rule 11 violation occurs). These factors may also be used to offset the initial calculation of the moving party's reasonable fees expended. See Doering v. Union County Bd. of Chosen Freeholders, 857 F.2d 191, 195 (3d Cir.

1988). The court considers the factors in light of circumstances as they were at the time of the alleged violations. See Schering Corp. v. Vitarine Pharmaceuticals, Inc., 889 F.2d 490, 496 (3d Cir. 1989).

Sanctions are imposed against the responsible party only when a claim is frivolous. Eastway Constr. Corp. v. City of New York, 637 F. Supp. 558, 564, 568 (E.D.N.Y. 1986). Rule 11 requires sanctioning the attorney, not the party, when the improper conduct involves a representation regarding the legal validity of a claim. See Fed. R. Civ. P. 11(c). With any other violation, either the attorney or the client, or both, may be sanctioned; when the attorney reasonably relies upon the misrepresentations of a client, the client not the attorney should be sanctioned under Rule 11. Eastway, 637 F. Supp. at 568.

Plaintiff's complaint asserted a claim under the UTPCPL based on defendants' alleged misrepresentations regarding the construction and characteristics of the product, an airplane kit. Array, president of Horizon, has acted as its general agent throughout the litigation, so his admissions are those of the plaintiff. See Fed. R. Evid. 801. A person has standing to sue under the UTPCPL only if the person "purchase[d] or lease[d] goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss." 73 Pa.

Con. Stat. Ann. § 201-9.2(a)(emphasis added); see also American Standard Life & Accident Ins. Co. v. U.R.L., Inc., 701 F. Supp. 527, 538 (M.D. Pa. 1988)(requirement of § 201-9.2(a) is a standing issue). Standing is case-specific; the intent of the party at the time of the purchase is determinative.

In the complaint, the corporate plaintiff alleged it purchased defendants' product for personal purposes. During discovery, Array stated in his deposition that his purpose was to use the airplane, when built, as a demonstrator to sell the kit to others as a business endeavor. In an affidavit submitted in opposition to defendants' motion for summary judgment, Array stated that the airplane kit was purchased by the corporate plaintiff for Array's personal use, without further explanation.

This apparent contradiction in testimony did not become evident until defendants moved for summary judgment. Based on Array's deposition testimony, whether Horizon met the UTPCPL standing requirements demanded resolution. The court denied summary judgment because there was a disputed issue of fact but ordered an evidentiary hearing on that issue beginning May 26, 1999.

The deficiencies in plaintiff's action became clear at the hearing.¹² Array, plaintiff's only witness, testified first that

¹² If the facts suggesting this action should not be pursued were manifested earlier, then defendants' motion for sanctions would be untimely. See Fed. R. Civ. P. 11, Advisory

he purchased the airplane kit to use personally for experience in building an airplane and to fly his friends places. Array then conceded that Horizon, through Array, had entered into an agreement with defendants that Horizon would use the airplane, when built, as a demonstrator to encourage potential customers to purchase kits from defendants. However, Array could not obtain insurance for that purpose. It was clear that at the time of the purchase Array wanted to sell defendants' products and use the product he purchased for demonstration purposes; the documented business communications between plaintiff and defendant support this conclusion. Array learned after purchasing the product but before filing this action that the Federal Aviation Administration ("FAA") regulations prohibited Horizon's and Array's intended commercial use. Horizon could not use the product for its intended purpose, but Array could use it personally. It was registered with the FAA in Array's name, although it was purchased by Horizon.¹³

At the hearing, Array insisted he never deducted the cost of the product on his income tax returns, despite his deposition

Committee Notes.

¹³ To prove Horizon intended to purchase the kit for personal use, it relies heavily upon FAA regulations prohibiting commercial use of the airplane kits. However, the evidence reveals Array and Horizon did not know of the regulation until after the kit was purchased. Based on the court's impression of Array at the hearing, the existence of the regulations does not prove Array intended to abide by them; it would only establish a motive for lack of candor.

testimony to the contrary; the tax returns, viewed by the court in camera, did not itemize deductions or depreciation, so this contention could not be verified. Array, as president of Horizon, never produced the corporate records that would show whether any costs were in fact deducted, despite efforts by defendants to obtain them with the help of the court. At the hearing, it became evident that plaintiff's counsel, Pedata, had been misinformed as to the location of these documents. Despite a representation that they were on a yacht in drydock in Yugoslavia, Array had access to them by computer.

The court continued the hearing before the completion of Array's cross-examination and redirect examination. The hearing had not been rescheduled, because of the unavailability of Array, before Horizon, through counsel, moved for voluntary dismissal of the action.

Plaintiff's action has now been shown patently frivolous. Array admitted at the hearing that Horizon intended a business endeavor. Array later used the airplane built from the kit for some personal use, but the original purpose in purchasing it determines standing. Array's deposition stated he intended to use the product for business purposes. This court does not remember a time when a witness has so contradicted his deposition testimony under oath in court. Array was willing to testify to anything he thought supported his claim, regardless of the truth or his actual intent at the time of purchase. Array is not an

attorney, but he clearly knew his intent, as agent for Horizon, in purchasing the product. It took a year and a half for that intent to become manifest from the clear evidence of record; even then he still insisted the corporate purchase was for personal use, despite his own words to the contrary. Array's misrepresentations go to the issue of standing, i.e., the right to bring this action. Defendants have been forced to defend this frivolous action, with its innumerable tangential disputes, because of Horizon's egregious conduct, through its president and agent, Paul Array. Sanctions are appropriate.

The intent of Array, the agent for Horizon, at the time of purchase is a matter no one knew better than Array, as intent is a matter of a party's state of mind. Counsel is permitted to assume his client is honest with him unless and until circumstantial evidence is obviously to the contrary. Counsel attempted to clarify the inconsistencies in Array's testimony at the hearing, but Array confounded those efforts. When it became clear that plaintiff had no grounds to assert a cause of action under the UTPCPL, Horizon, through counsel, filed a motion for voluntary dismissal. Sanctions will not be imposed against plaintiff's counsel.

Defendants will be awarded fees and costs as sanctions against Horizon, but they will not be permitted to recover for the frivolous and vexatious filings in this action. For instance, by Order of May 11, 1999, this court dismissed

defendants' second motion to consolidate as frivolous.

Defendants on a few occasions filed papers in this action applying to an action pending before United States District Judge Marvin Katz. This mistake caused confusion for both the court and plaintiff. Notwithstanding this conduct, it is outweighed by the egregious nature of plaintiff's vendetta in pursuing this action; the award of attorney's fees is appropriate.

The court finds it impossible to award sanctions in an appropriate amount on this record. Defendants have claimed fees of almost \$65,000, and expenses of \$11,468 without any supporting documentation. Without an itemized statement of hours expended for various tasks and hourly rates, the fees cannot be adjusted for non-reimbursable fees and costs.¹⁴ Defendants will be allowed to file a verified petition for attorney's fees and costs.

An appropriate Order follows.

¹⁴ In light of previous confusion between this action and the one before United States District Judge Marvin Katz, this court wants to make sure defendants understand that their petition should be for fees and costs directly related to this action; if hours are apportioned, the basis should be explained.

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ORDER

AND NOW, this 31st day of August, 1999, upon consideration of plaintiff's motion for voluntary dismissal, defendants' motions for sanctions, all response, and in accordance with the attached Memorandum, it is hereby **ORDERED** that:

1. Plaintiffs' motion for voluntary dismissal is **GRANTED**.
2. This action is **DISMISSED WITH PREJUDICE**.
3. Defendants' motion for sanctions against plaintiff's attorney pursuant to § 1927 is **DENIED**.
4. Defendants' motion for sanctions pursuant to Rule 11 (Docket paper # 120) is **GRANTED IN PART** and **DENIED IN PART**. Sanctions will be imposed against plaintiff but not against plaintiff's counsel.
5. Defendants may file an itemized petition for fees and costs within twenty (20) days.
6. All outstanding motions are **DENIED AS MOOT**.
7. The Clerk of Courts is directed to mark this action **CLOSED**.

Norma L. Shapiro, S.J.